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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

ARTHUR E. KING, Plaintiff, Cross-defendant and Respondent, v. ZORA M. BIAGINI, Defendant, Cross-complainant and Appellant.	C066878 (Super. Ct. No. 73512)

This case involves cross-actions to quiet title in an easement dispute between adjoining landowners -- plaintiff and cross-defendant Arthur E. King (owner of the alleged servient tenement)[1] versus defendant and cross-complainant Zora M. Biagini (owner of the alleged dominant tenement). In a bench trial, the trial court ruled the easement for ingress/egress was

[1] "The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement." (Civ. Code, § 803.)

extinguished as a result of merger. Specifically, the court ruled that merger extinguished an adjoining easement across a contiguous parcel, which had connected the subject easement to the road. Thus, the subject easement no longer connected to anything.

Biagini, acting in propria persona, appeals, arguing merger was not pleaded and did not occur.[2] King did not cross-appeal from the trial court's rejection of his alternate theories that the easement was extinguished by abandonment or prescriptive nonuse.

We conclude Biagini fails to meet her burden as appellant to show reversible error, and therefore affirm the judgment.[3]

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[2] Biagini, who was represented by an attorney in the trial court, filed the cross-complaint on behalf of herself as an individual, despite the fact that, before she filed the cross-complaint on January 26, 2009, she had already transferred the property to herself as Trustee for the HCR Family Trust on March 4, 2008 (after a February 2008 transfer to her daughter Judith Connolly as Trustee). The trial court on the first day of trial accepted the parties' stipulation to amend all pleadings to substitute the Trust. However, the judgment caption names "ZORA BIAGINI, and all person[s] unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title or any cloud on plaintiff's title . . . ."

[3] On March 25, 2011 and April 22, 2011, this court denied Biagini's motions to view sealed records or supplement/augment the record on appeal with exhibits from a different case, *Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, which had not been filed or lodged in this case. We now deny Biagini's May 18, 2011 motion to augment the appellate record with "TRIAL EXHIBITS 'IDENTIFIED BUT NOT ADMITTED INTO EVIDENCE' FROM TRIAL NOTEBOOK OF [Biagini's] ATTORNEY . . . ." However, one of those documents appears as an appendix to our published opinion in

FACTUAL AND PROCEDURAL BACKGROUND

In July 2008, King filed a pleading, a "FIRST AMENDED COMPLAINT TO ESTABLISH ABANDONMENT OF EASEMENT AND TERMINATION BY ADVERSE USE AND TO CLEAR RECORD TITLE."

In January 2009, Biagini filed a cross-complaint against King, alleging (1) breach of duty to maintain easement, (2) trespass (the placement of obstructions on the easement and the use of earth-moving equipment to obliterate part of the easement), (3) nuisance (the obstructions, etc.), (4) violation of the Nevada County Land Code by placing the obstructions and using the earth-moving equipment on and across the easement, and (5) entitlement to a preliminary and permanent injunction to prevent King from failing to maintain the easement and interfering with Biagini's use of the easement.

King filed an answer to the cross-complaint, denying that Biagini has an easement across his property and asserting that the easement was abandoned.

Evidence from the two-day bench trial[4] included the following:

Biagini v. Beckham, supra, 163 Cal.App.4th 1000, and on our own motion we take judicial notice of this map. Although this map does not depict the extinguished easement, it offers the clearest and most comprehensive overview of all the properties. The map is attached as Appendix A to this opinion.

[4] Biagini was represented by counsel at trial, but after judgment and notice of appeal, the trial court on January 14, 2011, granted the attorney's motion to be relieved as counsel.

In 1975, King and his wife bought property in Nevada County (hereafter County). (See Appendix A.) The northern portion was undeveloped. On the southern portion, King operated his business as a contractor of underground pipeline. Before buying the property, King operated his shop as a tenant of the previous owner. A chain of easements across other properties to the west gave King access to Allison Ranch Road.

In the mid-1970's, King and his wife wanted to split their property into two parcels and build a home. In 1977, they recorded a parcel map splitting their property into two parcels:

Parcel 1 -- the northern 10-acre portion, which Biagini now owns; and

Parcel 2 -- the southern five-acre portion which King owns.

To prevent Parcel 1 from becoming landlocked in the event of future sale, the County required the Kings to reserve access across Parcel 2, connecting Parcel 1 to the preexisting chain of easements over the other properties out to Allison Ranch Road. Accordingly, the parcel map reserved for the benefit of Parcel 1 a "Proposed 40'[-wide] private driveway access"[5] (shaped like a

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[5] Both parties agree the parcel map created an easement. Generally, a person cannot give himself an easement on his own land because, by definition, an easement is the right to use or prevent the use of the land *of another*. (Civ. Code, § 805 ["A servitude thereon cannot be held by the owner of the servient tenement"]; 6 Miller & Starr, Cal. Real Estate (3d ed. 2006) Easements, § 15:75, p. 15-241.) An owner of two adjoining parcels may create an easement by recording a covenant for easement for purposes of ingress and egress pursuant to a city or county ordinance. (Gov. Code, §§ 65870-65875; 28 Cal.Jur.3d (2004) Easements, § 19, p. 144.) But there are statutory

fishhook or a horseshoe -- hereafter, horseshoe easement) for ingress and egress across Parcel 2, which connected to an easement for ingress/egress across a different owner's parcel to the west (that parcel is called "the Grover Cleveland" parcel and is labeled "Beckham" on Appendix A), which connected to another easement for ingress/egress across another property, all of which provided Parcel 1 with access to Allison Ranch Road.[6]

Mrs. King did not want to use the uneven horseshoe easement through Parcel 2 and wanted a better paved access with fewer variations in elevation. Consequently, in 1978, the Kings purchased the adjoining Grover Cleveland parcel and built a paved road (King Way) running north and south over the Grover Cleveland parcel, connecting to the home on Parcel 1 and providing Parcel 1 with ingress and egress to Allison Ranch

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restrictions on creation, merger, and release. (Gov. Code, §§ 65871, 65874.) None of the parties claims this easement was created pursuant to these statutes.

[6] Exhibits to the first amended complaint showed not only the easement across Parcel 2 but also the connecting easements to the west. Some of the trial exhibits confusingly refer to the easement segments as "parcels." For clarity, the trial court referred to them as "segments." Segment 2 is the horseshoe easement that runs across Parcel 2, which was reserved in the parcel map recorded by the Kings. Segment 3 (which is one of two easements leading to Allison Ranch Road) comprises a 20-foot-wide right-of-way traversing the Grover Cleveland parcel from the northern boundary of Parcel 2 to the western boundary of the adjoining property. Segment 4 comprises a 20-foot-wide right-of-way from the western boundary of the property adjoining the King property, and it connects Segments 2 and 3 to Allison Ranch Road. We attach as Appendix B the map received as part of Exhibit 18, but we do so only for purposes of more clearly depicting Segments 2, 3, and 4 (labeled Parcel No. 2, Parcel No. 3, and Parcel No. 4 on the map).

Road. The Kings took no action to extinguish the easement over Parcel 2 that benefited Parcel 1.

The Kings built their home on Parcel 1 in the late 1970's. A dispute thereafter arose between the Kings and their neighbor to the north, Theodore Swartz, over Swartz's claim that he had a right to use an easement reserved across Parcels 1 and 2 for access to his property. The Kings and Swartz resolved their dispute in an agreement granting Swartz use of King Way to access his property and requiring Swartz to remove improvements he had made to the easement across Parcels 1 and 2.

King and his wife divorced in 1996. As part of the property settlement in the marital settlement agreement (MSA), on July 2, 1996, they recorded interspousal grant deeds in which Mrs. King relinquished to Mr. King her interest in Parcel 2, and Mr. King relinquished to Mrs. King his interest in Parcel 1 and the Grover Cleveland parcel. The interspousal deed in favor of Mrs. King expressly included in the property description for the horseshoe easement: "Parcel No. 2: [¶] An easement 40 feet in width for ingress, egress and public utilities as shown upon the Parcel Map for Arthur King, filed in the office of the County Recorder of the County of Nevada, February 25, 1977, in Book 11 of Parcel Maps, at Page 64."[7]

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[7] Biagini testified on cross-examination, without making any objection, that when she was doing her research before buying Parcel 1, she saw the interspousal deed for the Grover Cleveland parcel (Trial Exhibit 54) and a subsequent parcel map showing a lot line adjustment in which the subsequent purchasers of the Grover Cleveland parcel, the Beckhams, deeded to Mr. King the

At trial, Mr. King testified they did not delete the horseshoe easement from the interspousal deed in favor of Mrs. King because no one used it, Mrs. King had no interest in using it, he thought it would be expensive to undo the easement, and it would be easier for Mrs. King to take care of it when she sold Parcel 1. The MSA said nothing about any such agreement for Mrs. King to do so. To the contrary, the MSA contained an integration clause that all agreements were set forth in the MSA.[8] Mrs. King did not testify at trial, but her deposition testimony was submitted, in which she denied any such agreement but said she thought the settlement with Swartz sufficed to terminate the easement.

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portion of the Grover Cleveland parcel containing the Segment 3 easement (Trial Exhibit 15). Near the end of trial, during discussion about admitting exhibits, Biagini objected on relevance grounds to admission into evidence of the interspousal deed for the Grover Cleveland parcel (Trial Exhibit 54) and a subsequent grant to the Beckhams (Trial Exhibit 55), arguing the Grover Cleveland parcel was not at issue. King argued it was relevant to the merger issue. Biagini did not object that merger was outside the pleadings. The trial court admitted the exhibits into evidence. We discuss the lot line adjustment, *post*. (See fn. 13, *post*.)

[8] The MSA stated in clause 35, "Entire Agreement": "This agreement contains the entire agreement of the parties on these[] matters, superseding any previous agreement between them. No other agreement, statement, or promise made on or before the effective date of this agreement by or to either party or his or her agent or representative will be binding on the parties unless (a) made in writing and signed by both parties or (b) contained in an order of a Court of competent jurisdiction." Clause 40 prohibits subsequent modifications except by a writing signed by both parties, an oral agreement to the extent the parties execute it, or an in-court oral agreement made into a court order.

On July 29, 1999, Mrs. King sold Parcel 1 to Ray and Angela Fackrell.[9] The deed's description of the property included the easements to use King Way across the Grover Cleveland parcel and points west to Allison Ranch Road but said nothing about the horseshoe easement over Parcel 2.[10] Ray Fackrell, called as a witness by Biagini, testified he knew about the listed easements but was never told that there were any other easements or that any easements were being deleted. When asked if he ever knew he had an easement over Parcel 2, he said "No, I did not know that."[11] When Fackrell subsequently sold Parcel 1 to Biagini in

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[9] Different spellings of the surname appear in the record. We adopt the spelling used in the deed and given by Mr. Fackrell himself in his trial testimony.

[10] It was not necessary for the deed to specify the easement, because "[a] transfer of real property passes all easements attached thereto." (Civ. Code, § 1104.) Title officer Billi Moniz testified to that effect.

[11] In her opening brief, under a heading "**FACTS OF TRIAL**" and a subheading "**The trial court held that Ray Fackrel[l], as the previous owner of defendant's property[,] would have no reason to lie during trial**" (original boldface), Biagini discusses alleged prior inconsistent statements made by Fackrell in a declaration Biagini had him sign and in a deposition from prior litigation between Biagini and subsequent owners of the Grover Cleveland parcel, in which King was not a party. (See fn. 12, *post*.) We disregard these matters because the documents were not admitted as exhibits in the trial court, and we denied Biagini's motion to augment the appellate record to include them. (See fn. 3, *ante*.) Biagini refers to the declaration as Trial Exhibit 35, but the record on appeal indicates it was not admitted into evidence. To the extent Biagini claims evidentiary error by the trial court, she has failed to meet her burden as appellant to provide factual and legal analysis under an appropriate separate heading, and we therefore need not consider the point. (*People v. Turner* (1994) 8 Cal.4th 137,

2004, the area shown on the map as a 40-foot-wide horseshoe-shaped easement over Parcel 2 was overgrown with Manzanita and impassable.

Also on July 29, 1999, Mrs. King recorded a grant deed documenting Swartz's easement over King Way on the Grover Cleveland parcel and a quitclaim deed from the Kings as husband and wife to the Kings as unmarried persons for the easement over the Grover Cleveland parcel.

A 1999 title company order sheet contained a notation, "Take easement out and put new one in?! - Billi knows about." Title officer Billi Moniz testified she did not remember which easement the notation referenced. She thought the deed to Fackrell omitted the horseshoe easement because Mrs. King asked that it be omitted. Mrs. King submitted to the title company a request for "accommodation recording" of the deeds between herself and Swartz. Moniz testified the title company acts as a mere secretarial service in an accommodation recording -- preparing and recording documents without insuring anything.

In 2000, Mrs. King sold the Grover Cleveland parcel to the Beckhams.[12]

214, fn. 19; Cal. Rules of Court, rule 8.204(a)(1)(B)-(C).) We also note that Fackrell's trial testimony actually benefited Biagini. The trial court cited Fackrell's unawareness of the easement as a factor in its determination that the easement had not been abandoned.

[12] In *Biagini v. Beckham, supra*, 163 Cal.App.4th 1000, we held that, because the use of the paved road (King Way) over the Grover Cleveland parcel was within the scope of express private easements that Biagini and another landowner hold over King Way,

Also in 2000, Mr. King negotiated a lot line adjustment with the Beckhams, moving the lot line to incorporate into Parcel 2 the portion of the Grover Cleveland parcel containing the Segment 3 easement, i.e., the segment of the easement across the Grover Cleveland parcel that was a link in the chain of easements linking Parcel 2 to Segment 4 and to Allison Ranch Road.[13] In return, Mr. King granted to the Beckhams an easement over other adjoining property he owned, giving the Beckhams access to the Grover Cleveland parcel off Allison Ranch Road.

In June 2004, Biagini bought Parcel 1 from the Fackrells. The grant deed did not include in the legal description any reference to an easement over Parcel 2. Biagini, who is a real estate broker, testified she had checked the records in the Nevada County Recorder's Office and concluded, based on the lot line adjustment/parcel map, that Parcel 1 had two access paths -- the newer paved road (King Way) over the Grover Cleveland parcel, and the easement over Parcel 2 connecting with other easements to Allison Ranch Road. She said this was material to her decision to buy Parcel 1 from the Fackrells, because she wanted eventually to construct a second residence

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there was no basis for concluding that that use amounted to acceptance by the public at large of an offer to dedicate that road for public use.

[13] See Appendix C, the lot line adjustment/parcel map received as Exhibit 15. Segment 3 is labeled on the map "& 20' R/W per 217 or 457" in the area labeled "Beckham to King per LA 00-048 Doc. No. 2001-0029489." The trial court disregarded the handwritten notation "Grover Cleveland" and the arrows when it received the document. So do we.

near the boundary of Parcels 1 and 2. Biagini testified that when she first visited Parcel 1 in April 2004, she drove the entire easement road over Parcel 2 in her Land Rover, and the road was "spotless" and allowed her passage without difficulty, although she did observe steel gasoline tanks stored on and adjacent to the easement. In contrast, Ray Fackrell testified the easement area over Parcel 2 was completely overgrown and impassible. Photographs showed (as found by the trial court) that improvements constructed in the easement area and dirt graded onto the easement area would have made travel difficult if not impossible in 2004.

In September 2005, Biagini sent a letter to King's tenant on Parcel 2, Bernie Franza, stating "It may interest you to know that I have an easement <u>through your lot</u> to my place . . . . [¶] This easement has recently become more important to me as I want to utilize the road below my pond for a fire lane." (Original underscoring.) The letter asked Franza to remove old tanks and debris from the easement area. Mr. King reacted by installing chain and cable barriers to block access to the area at the boundaries of Parcel 2. Biagini and Mr. King met but were unable to resolve their differences, and this litigation ensued. Biagini also complained to the County, which sent a letter telling King to remove the items. King responded with a letter disputing the easement, expressing his understanding that the County did not involve itself in easement disputes, and stating he had filed a quiet title action in court.

During Mr. King's testimony on the first day of trial, his attorney sought to admit exhibits into evidence, including Trial Exhibit 15 -- the lot line adjustment in which Mr. King acquired from the Beckhams the portion of the Grover Cleveland parcel containing the Segment 3 easement. Biagini's attorney objected on the grounds it was not a certified copy, there was no testimony about how it was prepared, the map bore a handwritten notation -- "Grover Cleveland" -- and because the document was incomplete, since page two of two was missing. Biagini's attorney argued his concern was that King "may point to this document as evidence of the elimination of the subject easements because for whatever reason this document only depicts one of the subject easements." The map does not show the horseshoe easement. The trial court sustained the objection on the ground it was an incomplete document. King's attorney said, "We're only offering it as aid in understanding the ownership that Art King has. We're not offering it to prove that the easement was deleted or that it doesn't exist."

The trial court interjected, "Hang on just a second. Because I was thinking of the merger doctrine when I was listening to this testimony where the easement ends up on his property when the easement in part benefited his property. That's a different question than Ms. Biagini's property which is distinct from Mr. King's property. And so, from a legal standpoint, if in fact there was a merger, that wouldn't have anything to do with Ms. Biagini's rights, if she had any, to continue using the easement." King's counsel agreed. Biagini's

attorney offered to stipulate that there was a lot line adjustment as reflected by Trial Exhibit 53. The trial court said Exhibit 53 did not show that Segment 3 ended up on King's side of the property line. The court at that point sustained the objection on the ground of incomplete document.

Thereafter, during cross-examination of Biagini as to why she believed she had an easement over Segment 3, King's counsel showed her Exhibit 15, the lot line adjustment, and she indicated she had seen it during her prepurchase research. She believed the Segment 3 easement predated the lot line adjustment and was never removed. King's counsel asked Biagini if she was familiar with the concept of merger. She testified she was "[a] little bit" familiar with the concept, but indicated she did not know how it applied to easements. At no time during this testimony did Biagini object that merger was outside the scope of the pleadings.

Near the end of trial, when King's attorney sought to admit into evidence Exhibit 54 (interspousal grant deed from Mr. King to Mrs. King for the Grover Cleveland parcel) and Exhibit 55 (Mrs. King's grant deed of the Grover Cleveland parcel to the Beckhams), Biagini's attorney objected on the ground of relevance. King's attorney said they were relevant to merger. The first deed conveyed the Grover Cleveland parcel to Mrs. King, and since she owned the Segment 3 easement, merger extinguished that easement as to her, and then she conveyed the property to Beckham without the easement. The trial court saw

no downside to admitting the documents and then later hearing argument about their meaning.

Ultimately, the trial court admitted Exhibit 15 -- the lot line adjustment -- because Biagini was questioned about it and identified it as something she relied on. Having first noted that page two was missing, the court observed that the second page was most likely just the surveyor's description.[14]

Apparently, Biagini submitted a closing trial brief to the trial court, but it does not appear that Biagini designated it as part of the record on appeal. We only know she filed such a brief because the record contains a reply brief filed in the trial court by King on May 21, 2010, stating it is in reply to Biagini's closing trial brief. King responded to Biagini's argument that words King used in his first amended complaint amounted to a judicial declaration of the continued existence of the easement.

On May 21, 2010, Biagini filed a reply closing brief, arguing the merger theory was untimely because it had not been alleged in the pleadings. She argued she was prejudiced because she could have conducted discovery on the merger theory and could have insisted on Mrs. King's attendance at trial, rather than agreeing that her deposition testimony could be used. Biagini also argued (1) King admitted in his verified complaint that the easements "now burden" his property; (2) there was no

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[14] See footnote 13, *ante*.

evidence of intent by Mrs. King to extinguish the easement by merger; (3) the mortgage on Mrs. King's property prevented merger; and (4) common ownership of all three parcels, including Mr. King's parcel, would be required in order for the merger doctrine to apply.

After the trial court issued a tentative statement of decision, Biagini made similar arguments in a request for modification of the tentative decision.

On October 14, 2010, the trial court issued its written final decision. The trial court found the easement over Parcel 2 was not extinguished by abandonment or prescriptive use. We need not discuss those theories, because King has not filed a cross-appeal.

The trial court did not rule that Segment 2 -- the horseshoe easement over King's property which is the subject of this litigation -- was extinguished by merger. Rather, the court ruled that the *Segment 3* easement (over the southern tip of the Grover Cleveland parcel) was extinguished by merger in 1996, when by interspousal deed Mrs. King became the owner of both Parcel 1 and the Grover Cleveland parcel. The court concluded that, since that meant the horseshoe easement (Segment 2) led to nothing but a dead-end, the horseshoe easement was "superfluous" because "it does not connect to anything."

The court noted that a recorded easement terminates when the same party holds the coextensive and equal title to both the dominant and servient tenements, because one cannot hold and

does not need an easement over his or her own property. The trial court said, "The evidence admitted at trial indicates that, as a part of the property settlement when the Kings divorced, Mrs. King owned as her separate property both [P]arcel 1 (the dominant tenement) and the Grover Cleveland [parcel] over which [S]egment 3 of the easement passed (the servient tenement). That common ownership took effect on July 2, 1996, when the interspousal grant deed was recorded. (Exhibit 54.) Consequently, as of that day, [S]egment 3 of the easement over the Grover Cleveland [parcel] was extinguished as to [P]arcel 1 by the doctrine of merger."

The trial court addressed Biagini's arguments against merger. First, in response to Biagini's objection to the admission of the deeds that established the merger of title in Mrs. King, the court said, "That ship sailed when those two deeds were admitted at the conclusion of the trial."

Second, in response to Biagini's argument that title was not "coextensive because the [S]egment 3 easement benefited Parcel 2 . . . at the time of the merger," the trial court acknowledged case law that extinguishment of an easement as to one dominant tenement leaves in place the easement as to other nonmerged parcels held by third parties. (*Leggio v. Haggerty* (1965) 231 Cal.App.2d 873, 881 (*Leggio*).) The court said Mrs. King's interspousal grant of Parcel 2 to Mr. King made Mr. King a third party in this circumstance. Parcel 2's appurtenant easement over Segment 3 remained undisturbed, but

Parcel 1's easement over Segment 3 merged and was therefore extinguished.

Third, in response to Biagini's argument that the trial court should not consider the merger doctrine because it was not expressly alleged in King's complaint, the trial court agreed merger was not alleged, but said "Biagini's request for equitable relief in the form of the injunction opens the door for the court to consider the doctrine of merger as a defense to Biagini's causes of action and prayer for equitable relief."

Fourth, in response to Biagini's citation of *Ito v. Schiller* (1931) 213 Cal. 632 (*Ito*) for the proposition that the *intention* of the owner must be determined in analyzing whether merger extinguishes the easement, the trial court explained that *Ito* was distinguishable. The court ruled that a finding of intention is not required in this case.[15]

Finally, in response to Biagini's invocation of equity, the trial court agreed that equity must be considered but concluded the balance of equities favored King. Thus, said the trial

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[15] The trial court reasoned that Biagini's argument that the owner must intend a merger "exceeds the authority of *Ito*. *Ito* involved a leaseback of a portion of the premises by the owner, a fact not present in our case of common ownership by Mrs. King. That important factual distinction precluded the court [in *Ito*] from analyzing Civil Code sections 805 and 811, which by their terms do not depend upon the owner's intent to effect extinguishment by merger. The *Ito* precedent cited by Biagini about a requirement of additional evidence of intent must be limited to its facts in light of the pain [*sic*] wording of Civil Code sections 805 and 811 -- facts that are not present in our case." (Most italics omitted.)

court, Biagini's testimony about a "spotless" easement was "patently false when juxtaposed against the other uncontroverted evidence that the easement was overgrown and [a] partly obstructed 'goat path' as of that time. *That credibility defect on a material point of factual dispute colors all aspects of Biagini's testimony throughout the entire case*. . . ." (Original italics.) King's actions on his parcel after the interspousal transfer were consistent with termination of the easement. Biagini presented no evidence of taking any action consistent with her claim that she intended to build a second residence on Parcel 1; nor did she present evidence of the County's approval or intent to approve such plans. Consequently, said the court, it must balance her loss of that "purely hypothetical benefit" against the actual hardship to King if the previously unused easement were to be improved to provide a second access to Parcel 1. Additionally, though not sufficient to establish abandonment by themselves, the evidence regarding the Kings' negotiation of alternate access, Mr. King's understandings about what he viewed as abandonment of the easement over Parcel 2 by Mrs. King, and Mrs. King's view that no further action was needed to abandon the easement in light of the Swartz settlement, all supported King's side in balancing the equities.

The court concluded, "[S]egment 3 of the easement was extinguished as to [P]arcel 1 when Mrs. King held title to both [P]arcel 1 and the Grover Cleveland [parcel]."

The trial court also determined that Biagini's inability to use the horseshoe easement for ingress/egress to and from Parcel 1 resulted in "[o]nly [h]ypothetical [d]amages." Since the horseshoe easement over Parcel 2 does not connect to anything, King's blocking of access with cables and chains created no real damage to Biagini. The trial court awarded Biagini nominal damages of $1.

On November 17, 2010, the trial court entered judgment as follows:

On King's first amended complaint claiming abandonment and termination of the easement by prescriptive use, the court entered judgment against King and in favor of Biagini.

On Biagini's cross-complaint, the court entered judgment in favor of King on the first count (breach of duty to maintain easement) and the fifth count (seeking injunctive relief). The court entered judgment in favor of Biagini on her second count (trespass), third count (nuisance), and fourth count (nuisance based on violation of land use code), and awarded Biagini nominal damages of $1.

The trial court awarded Biagini three-fifths of her costs, reasoning that she was the prevailing party on three of five claims between the two parties.

Biagini filed a timely notice of appeal.

DISCUSSION

I. Variance Between Pleading and Proof

Biagini complains the trial court decided the case on the basis of the merger doctrine, which was first suggested by the

trial court itself and which was never alleged in the pleadings. However, we will conclude Biagini has forfeited this issue on appeal by failing to offer any legal analysis or authority.

A litigant acting in propria persona is held to the same standards as an attorney. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 (*Rappleyea*) [rule that appellate court need not consider arguments raised for the first time in reply briefs applies to pro se litigants]; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["self-represented parties are entitled to no greater consideration than other litigants and attorneys"]; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 [pro se litigants are not entitled to special exemptions from rules of court].)

An appellant has the burden to demonstrate reversible error with reasoned argument and citation to authority. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*); California Rules of Court, rule 8.204(a)(1)(B), (C) [each brief must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and [¶] [s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].) "'The appellate court is not required to search the record on its own seeking error.' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

"When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to

authority, we treat the point as [forfeited]. [Citations.]" (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.)

Biagini offers no legal analysis or authority, despite the existence of a substantial body of statutory and case law regarding the question of variance between pleadings and proof. For example, Code of Civil Procedure section 469 states: "No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just." Amendment of a pleading may even be allowed at the time of trial, absent a showing of prejudice. (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 915.) Code of Civil Procedure section 470 states: "Where the variance is not material, as provided in Section 469 the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." "Such amendments at trial to conform to proof, 'if not prejudicial, are favored since their purpose is to do justice and avoid further useless litigation.' [Citation.]" (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909 (*Garcia*).)

Here, King did not move to amend his answer to the cross-complaint to assert merger as a defense to Biagini's claim of entitlement to an easement. Arguably, Biagini's objections during trial were insufficient to put King on notice that

Biagini was complaining on the ground of variance -- a simple matter which easily could have been corrected by a motion to amend that the trial court surely would have granted. (*Schweitzer v. Westminster Investments, Inc.* (2007) 157 Cal.App.4th 1195, 1214, citing *Fernandez v. Western Fuse & Explosives Co.* (1917) 34 Cal.App. 420, 422-423 [failure to make sufficient objection in trial court may estop party from complaining of variance].) When King submitted the lot line adjustment map, Biagini's attorney objected only on the grounds that the document was not certified, there was no testimony as to its preparation, there was a handwritten note on the document, and the document was incomplete. No further objection was made at the end of the trial when Exhibit 15 was ultimately received based on King's argument that Biagini had testified that she reviewed it prior to purchasing the property. When, at the end of the trial, King's attorney sought to admit Exhibit 54 (interspousal grant deed from Mr. King to Mrs. King for the Grover Cleveland parcel) and Exhibit 55 (Mrs. King's grant deed of the Grover Cleveland parcel to the Beckhams), Biagini's attorney objected only on the ground of relevance. He did not specify a problem of variance between pleading and proof, despite the fact that counsel for King argued the documents were relevant to show merger. Not until the posttrial brief did Biagini clearly present the variance issue. It is clear the trial court would have granted leave to amend had Biagini clearly raised the question of variance between pleading and proof during trial.

In any event, this court has observed a failure to amend may be inconsequential. (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal.App.3d 68, 81.) In *Pierce*, this court wrote, "A motion to amend would undoubtedly have been the prudent and lawyerlike thing to do. However, we note initially that leave to amend would in all likelihood have been granted since any amendment would have involved the 'same general set of facts' as the original complaint, and PG & E had made no showing of prejudice. [Citations.] . . . [I]f the proof is presented and the issue clearly tendered, the failure formally to amend the pleading is immaterial. [Citations.] Here, we have no doubt that defendant and, more importantly, the trial court were fully put on notice and informed of plaintiff[s'] theory of liability. In these circumstances, the purpose of an amendment to the complaint was satisfied. Plaintiffs' failure to amend does not bar their pursuit of liability on a theory that electricity was a defective product." (*Pierce*, *supra*, 166 Cal.App.3d at p. 81 [reversed order granting defendant's motion for nonsuit].)

Biagini fails to show any prejudice in the trial court's noticing that the evidence raised the question of merger. In the trial court, she claimed prejudice in that she could have conducted discovery or required Mrs. King's attendance at trial, but she fails to explain how these things would have helped her. Merger was based on the documents, and the documents speak for themselves. Usually, no prejudice results if the same set of facts supports merely a different theory, e.g., an easement as opposed to a fee. (*Garcia*, *supra*, 173 Cal.App.4th at p. 910.)

The trial court gave Biagini the opportunity to present any evidence or argument she wished regarding merger. She did not ask for a continuance. She submitted a brief arguing against merger. The trial court addressed each of her points in its statement of decision.

As can be seen, there are several facets to the question of variance between pleading and proof. Even assuming Biagini adequately objected on variance grounds in the trial court, having failed on appeal to confront the foregoing authorities on variance or offer any legal analysis, Biagini has forfeited her contention that variance between pleading and proof requires reversal of the judgment.

II. Merger

Biagini admits merger as to Segment 3 "could have occurred" (italics omitted), but she says merger did not occur in this case. As indicated, self-represented appellants are held to the same rules as attorneys (*Rappleyea, supra*, 8 Cal.4th at pp. 984-985), and on appeal we need address only the points adequately raised by Biagini in her opening brief on appeal (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345 & fn. 6 [appellant forfeits issue by failing to raise in opening brief]; *Badie, supra*, 67 Cal.App.4th at pp. 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as [forfeited]."]). We will conclude the points she does raise fail to demonstrate grounds for reversal.

This appeal presents questions of law, which we review de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801.) Where the inquiry requires a consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and will be reviewed de novo. (*Ibid*.)

"A servitude is extinguished: [¶] 1. By the vesting of the right to servitude and the right to the servient tenement in the same person . . . ." (Civ. Code, § 811.) A recorded easement may be terminated by merger when the same party holds the coextensive and equal title to both the dominant and servient tenements. (*Leggio, supra,* 231 Cal.App.2d at p. 881.) This doctrine of merger flows logically from the notion that one cannot hold and does not need an easement over his or her own property. (*Wilson v. Pacific Electric Ry. Co*. (1917) 176 Cal. 248, 254; 6 Miller & Starr, Cal. Real Estate, *supra*, Easements, § 15:75, p. 15-241.) To effect an extinguishment by merger, the title and ownership held in both tenements must be coextensive and equal in validity, quality, right to possession, and all other characteristics. (6 Miller & Starr, Cal. Real Estate, *supra*, Easements, § 15:75, pp. 15-241 to 15-242, & cases cited therein.)

Biagini's opening brief on appeal makes four arguments:

Her first heading is "**Merger *could* have occurred.**" (Original boldface, italics.) Here she acknowledges merger as to Segment 3 "could" have taken place in 1978 when the Kings bought the Grover Cleveland parcel, or in 1996 when Mrs. King

acquired Parcel 1 and the Grover Cleveland parcel. This is not helpful to her appeal.

Biagini's next heading is "**MORTGAGE: Merger could not have occurred. The easement was not extinguished because of an exception that protects the interests of a Mortgagee**." (Original boldface.) She says there was a mortgage on Parcel 1. Biagini cites a New York case (*Cowan v. Carnevale* (2002) 300 A.D.2d 893 [752 N.Y.S.2d 737] (*Cowan*)) for the proposition that an exception to merger exists to protect the interests of a mortgagee. However, out-of-state cases are not binding on this court. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 490.) No California case recognizes such a mortgagee exception. As we have noted, Civil Code section 811 says a servitude is extinguished "[b]y the vesting of the right to servitude and the right to the servient tenement in the same person." *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615 (*Zanelli*) rejected an appellant's reliance on *Cowan, supra*, 752 N.Y.S.2d 737 for the proposition that extinguishment by merger does not apply when a group of persons, rather than one individual, owns the dominant and servient estates. (*Zanelli, supra*, 166 Cal.App.4th at p. 626 [merger occurred when prior owners held title to both parcels, regardless of whether they held title as joint tenants or tenants in common].) The court in *Zanelli* said, "In the context of extinguishment by merger, the use of the phrase 'unity of title' means that ownership of the 'right to the servitude' and the right to the servient tenement must be *united in the same person or group of persons*, that the owner have an

estate in fee simple in both the dominant and servient tenements and a present possessory interest, and own the entirety of the interest in the dominant and servient tenement estate, not merely a fractional share." (*Zanelli*, *supra*, at p. 628, fn. 10.) A fee title subject to a mortgage fits within this definition. Biagini offers no reasoned argument for adopting a mortgagee exception in California.

Biagini quotes from *Leggio*, which stated that an easement extinguished by merger "remains extinguished only for the time that the unity of title continues." (*Leggio, supra,* 231 Cal.App.2d at p. 882.) Biagini does not develop the point but, if she means to argue her subsequent purchase of Parcel 1 revived the easement, she fails to prove that point. "An easement once extinguished 'does not come into existence again merely by severance of the united estates. . . .' [Citation.] It must either be 'newly created' by 'an express stipulation in the conveyance by which the severance is made or from the implications of the circumstances of the severance.' [Citations.] The act of severance alone does not revive the extinguished easement." (*Zanelli, supra*, 166 Cal.App.4th at pp. 634-635.)

Biagini's third heading is "**The trial court erred in its application of *Taylor v. Avila*** [(1917) 175 Cal. 203, 206,] **which upholds the finding that extinguishment is met upon the granting of a deed.**" (Original boldface.) However, the trial court did not apply *Taylor* but merely miscited it for the proposition that the doctrine of merger flows logically from the notion that one

cannot hold an easement over his own property. *Taylor* was not a merger case and has nothing to do with our case. However, the legal principle cited by the trial court is sound and indeed is codified in Civil Code section 805, which provides, "A servitude thereon cannot be held by the owner of the servient tenement."

Biagini's final heading is "**The Final Decision of the trial court was based upon the use of Exhibit 52, confusing the Swartz'[s] 20' easement across Parcel 2 with Biagini's 40' easement across Parcel 2.**" (Original boldface.) Biagini's entire argument under this heading is: "Trial Exhibit 52 only shows the Parcel Map #64, creating the 'proposed' 40' easement that Nevada County required from the Kings[] to split their original 10[-]acre parcel. It does not show or have anything to do with the road that Swartz claimed he had a right to use. This Parcel Map #64 was created and recorded February 25, 1977 in Book 11/64 at the request of Arthur King. The Swartz'[s] original easement is not on any Parcel Map."

Biagini's citation to the trial court's reference to Exhibit 52 in connection with Swartz is to the portion of the statement of decision giving the factual background of the case. In the trial court's discussion of merger, the only reference to Swartz was in the course of balancing the equities, when the trial court said various factors, including "Mrs. King's view that no further action was required to abandon the easement in light of the [Swartz] settlement," could be considered in balancing the equities.

Even assuming for the sake of argument that Exhibit 52 was the wrong exhibit for Swartz's easement, and even assuming for the sake of argument that the trial court confused Swartz's easements with Biagini's easements as Biagini contends, Biagini fails to show any conceivable reason why this would constitute reversible error. "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown." (Code Civ. Proc., § 475; see also Cal. Const., art. VI, § 13 [no judgment shall be set aside unless error has resulted in a miscarriage of justice]; *Gilb v. Chiang* (2010) 186 Cal.App.4th 444, 461 [same].)

Though not adequately presented, we will address some additional points made by Biagini under the heading, "**SUMMARY OF ARGUMENT.**"

Biagini argues merger is barred by what she characterizes as a judicial admission by King in paragraph 7 of his first amended complaint, in which King stated that Mrs. King, in their marital settlement, agreed to abandon the easement "which now burdens the plaintiff's property."[16] We question whether Biagini raised this specific point in the trial court. The trial court's statement of decision rejected Biagini's claim that a *different* paragraph, paragraph 4 of the first amended complaint (which alleged plaintiff's property was burdened with an easement "prior to" November 1988), constituted a judicial admission that the easement existed as of November 1988. Moreover, Biagini fails to provide legal analysis or authority. She merely cites authority using pleadings as judicial admissions in cases involving motions for summary judgment. (E.g., *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal.App.4th 1234, 1248.) She ignores the legal principle that the doctrine of judicial admissions applies only to unequivocal statements of fact, and "[l]egal conclusions and assertions involving a mixed question of law and fact are not the stuff of judicial admissions." (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 384; see also *Castillo v. Barrera* (2007)

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[16] Paragraph 7 of the pleading alleged that after 1988 "plaintiff and his then wife, Sharon L. King, divorced. As part and parcel of the dissolution the plaintiff's then wife, Sharon L. King, received the property now owned by the defendant. In connection with their settlement she agreed to abandon the above-described easement which now burdens the plaintiff's property. . . ."

146 Cal.App.4th 1317, 1324.) Whether or not an easement burdens property is a legal conclusion, not a judicial admission of fact. Moreover, unclear or equivocal statements do not create a binding judicial admission. (*Stroud, supra*, 160 Cal.App.4th at p. 385.) Here, it is clear the first amended complaint was not admitting an easement, because the complaint also alleged and sought a judicial determination "that the easement has been abandoned and the record title to plaintiff's property is free of the burden of the easement . . . ." Accordingly, we reject Biagini's claim of judicial admission.

Biagini argues Mrs. King's request to the title company for an accommodation recording related to the Swartz settlement showed Mrs. King was knowledgeable about easements and therefore her failure to record anything extinguishing the easement claimed by Biagini proves Mrs. King did not intend to extinguish it. However, the judgment was not based on intent as intent is not required (Civ. Code, §§ 805 & 811), and Biagini fails to develop any legal analysis or authority requiring reversal of the judgment on this ground.

Biagini asserts that the first time the horseshoe easement was expressly deeded was in the 1996 interspousal deeds (long after the new road was paved). Before that, the parcel map merely listed the horseshoe as "proposed." This point fails to address the trial court's reasoning concerning the merger. The trial court did not rule that the horseshoe easement merged, but rather that Segment 3 merged, leaving the horseshoe a dead end to nowhere.

Biagini repeatedly makes an unsupported accusation that the trial judge was biased against her. We see no evidence of bias. That the trial court recognized the potential merger issue and disbelieved Biagini's testimony does not mean the court was biased.

We conclude Biagini fails to meet her burden as appellant to demonstrate error warranting reversal of the judgment.

DISPOSITION

The judgment is affirmed. Respondent Arthur E. King shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1)-(2).)

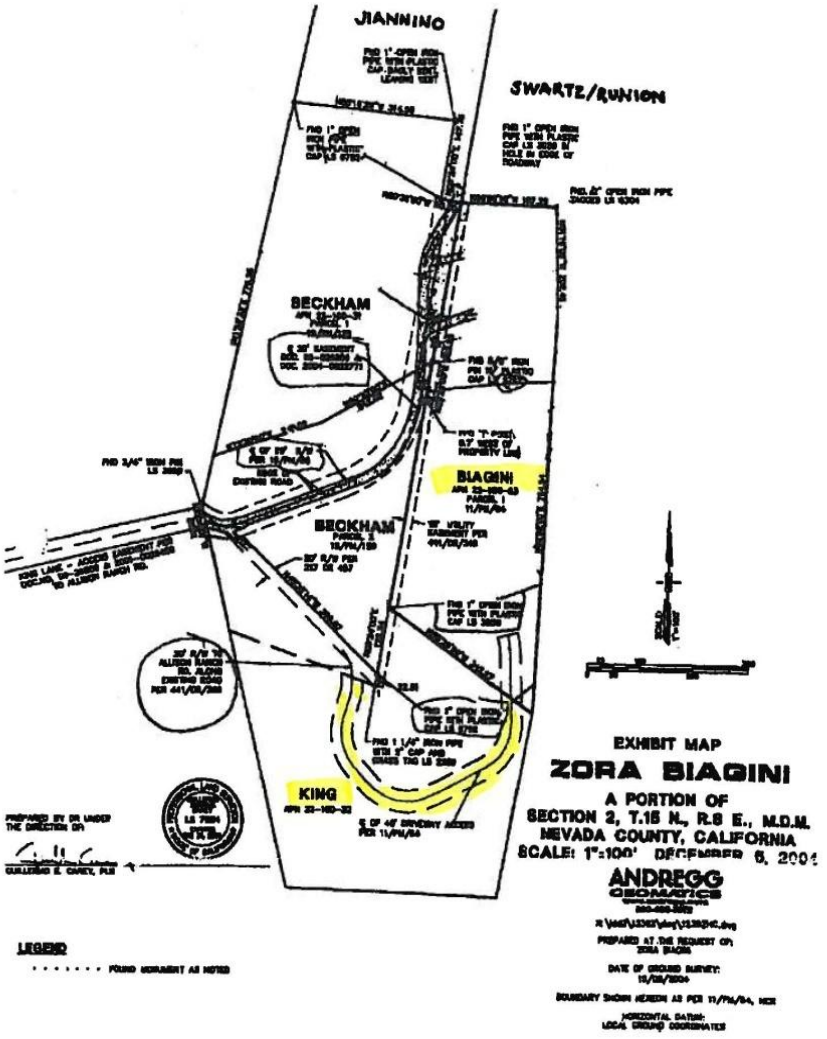
MURRAY, J.

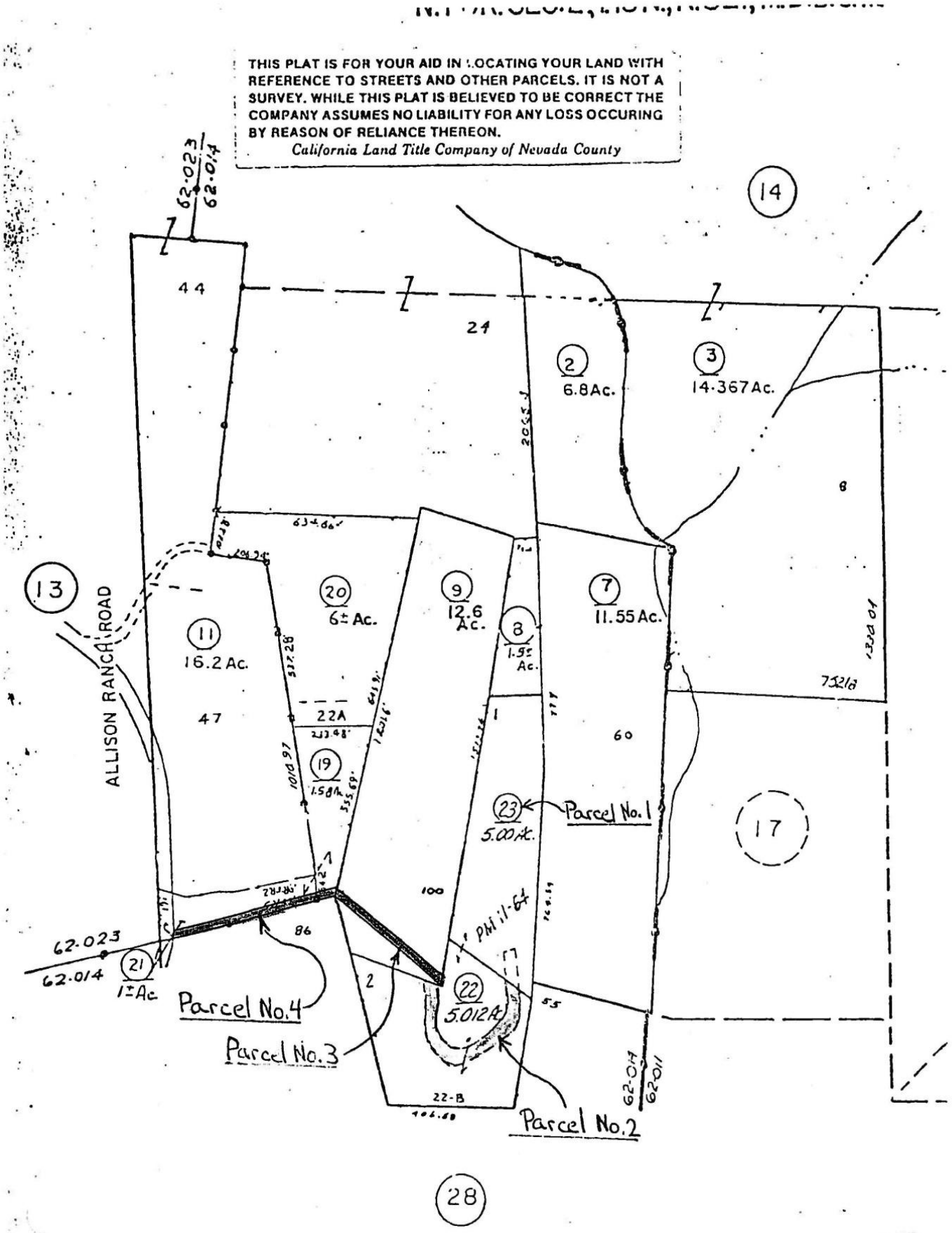
We concur:

HULL, Acting P. J.

BUTZ, J.

APPENDED MAP

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California Land Title Company of Nevada County
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ALLISON RANCH ROAD
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16.2 Ac.
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9
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7
11.55 Ac.
22A
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60
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5.00 Ac.
Parcel No. 1
17
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PM 11-64
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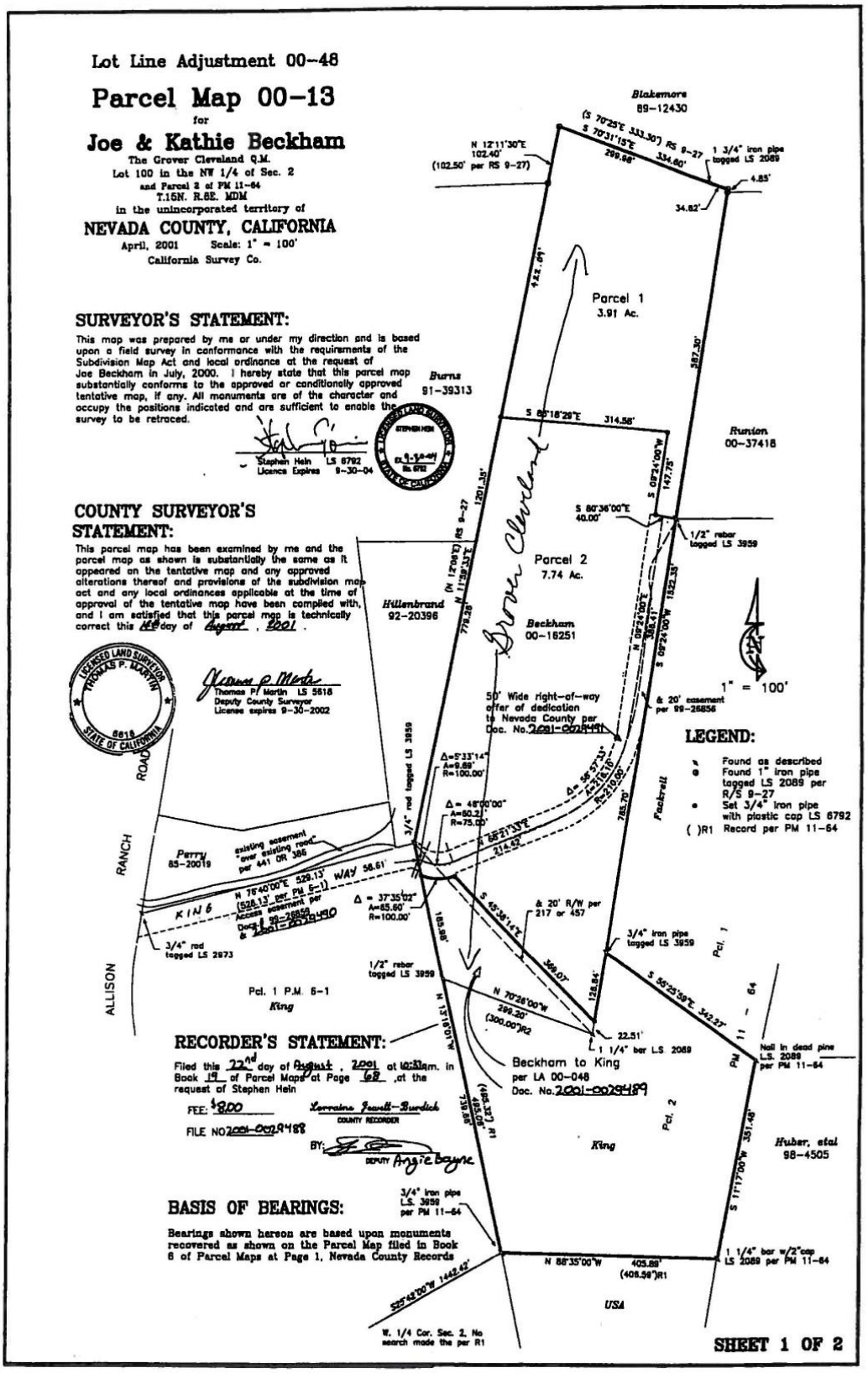

Appendix C